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NOTES OF CASES.

Criminal Law—Argument of Counsel—Failure to Call Accomplice —Comment on Failure of Criminal Defendant to Call as Witness Person Jointly Indicted.—In People *v.* Munday, 117 N. E. 286, in the Supreme Court of Illinois—the principal ground of reversal of a conviction under an indictment charging conspiracy, with intent to wreck a bank, was comment by the prosecuting attorney upon the neglect of the defendant to call as witnesses persons jointly indicted with him. The following is from the opinion of the majority:

"Defendant in error contends that it is proper for the state to comment on the failure of a defendant to produce a witness when such witness, by reason of friendship, association or interest, is more available to the defense than to the state. While there is some apparent conflict in the authorities, the general rule is that the omission or failure of a defendant in a criminal prosecution to call as witnesses those who could testify of their own knowledge to material facts raises no presumption of law that if called they would have testified unfavorably to him, but the jury may consider his failure to produce or to endeavor to produce such witnesses as a circumstance in determining his guilt, provided it is manifest that it is within the power of the accused to produce such witnesses and that such witnesses are not accessible to the prosecution (12 Cyc. 385; Commonwealth *v.* Webster, 5 Cush., Mass., 295, 52 Am. Dec. 711; State *v.* Cousins, 58 Iowa, 250, 12 N. W. 281; State *v.* Fitzgerald, 68 Vt. 125, 34 Atl. 429; Brown *v.* State, 98 Miss. 786, 54 South. 305, 34 L. R. A., N. S., 811; Brock *v.* State, 123 Ala. 24, 26 South. 329). It does not appear that plaintiff in error attempted to suppress any evidence or to prevent the state from having access to any witness who could testify to any material facts. Lorimer and Huttig were jointly indicted with plaintiff in error, and they had not yet been tried. It follows that they were either in custody or at liberty on bail. It does not appear that they were any less accessible to the state than they were to plaintiff in error. Whether called by plaintiff in error or by the state their testimony could not have been secured without their consent, as they had the constitutional right to decline to testify if matters concerning which they were interrogated would tend to incriminate them.

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In State *v.* Cousins (58 Iowa 250), the trial court instructed the jury that the defendant had the right to call his codefendant as a witness, and the fact that he had not done so when he could have been called and examined was a circumstance that might be taken against him and that the jury might give it such weight as they thought it was entitled to. The Supreme Court of Iowa, in reversing the judgment of conviction for the giving of this instruction, said:

"The doctrine that the failure of the accused to introduce evidence explanatory of inculpatory circumstances may be regarded as a circumstance against him is to be cautiously applied, and only in cases where it is manifest that proofs are in the power of the accused not accessible to the prosecution (Wills on Circumstantial Evidence, 5th Am. ed., 1876; Commonwealth *v.* Webster, 5 Cush., Mass., 295, 52 Am. Dec. 711; State *v.* Rosier, 55 Iowa 517, 8 N. W. 345). A defendant in a criminal case is by statute made a competent witness in his own behalf, but the fact that he does not become a witness is not to have any weight against him, and must not be alluded to on the trial (Miller's Code, 3636). There is even greater reason why the failure to call as a witness an alleged accomplice should not be regarded as a circumstance against the accused. A degree of discredit is by the state cast upon the accomplice by accusing him of a crime, and the defendant might well conclude that his testimony would have but little weight. The accused may, in fact, be innocent and the alleged accomplice guilty. Under such circumstances the accused might be greatly prejudiced if he should call his codefendant, who might shield himself at the expense of the other party. Besides, one charged with a crime scarcely ever acts naturally, and the testimony of a really innocent party accused of a crime might be of such a character and presented in such a manner as to create a strong suspicion of guilt. In addition to all this, the alleged accomplice was as accessible to the state as to the defendant. Under the doctrine of State *v.* Rosier (55 Iowa 517, 8 N. W. 345), no presumption arises against the defendant on account of his failure to call Hilliard as a witness. We unite in the opinion that the court erred in giving this instruction." The Illinois court approves of the decision and reasoning of the Iowa court in State *v.* Cousins, and expresses the opinion that there was no substantial distinction between that case and the case a bar, because in the one the trial judge had instructed the jury that the defendant had the right to call his codefendant and the fact that he had not done so was a circumstance that might be taken against him, while in the other the prosecuting attorney had stated that it was the accused's duty to call his codefendants, and commented upon his failure so to do, the trial judge refusing, upon objection, to hold that such argument by counsel was improper. The majority of the Illinois court were of the opinion that "the jury were thus told, as plainly as though they had been instructed in writing, that it was the duty of plaintiff in error, under the law, to call his codefendants as witnesses, and that they had a right to consider that as a circumstance against him and to give it such weight as they deemed it entitled to."

There is some conflict among the authorities as to whether comment by a prosecuting attorney merely upon neglect to call a codefendant or a person jointly indicted is erroneous. A difference

of view on this point is manifested in the prevailing and dissenting opinions in Illinois. It seems to be conceded by the dissenting judges that the district attorney had incorrectly stated to the jury that it was the duty of the defendant to call his codefendants. In Wigmore on Evidence (sec. 288) occurs the following language:

"It is commonly said that no inference is allowable where the person in question is equally available to both parties; particularly where he is actually in court; though there seems to be no disposition to accept such a limitation absolutely or to enforce it strictly. Yet the more logical view is that the failure to produce is open to an inference against both parties, the particular strength of the inference against either depending on the circumstances. To prohibit the inference entirely is to reduce to an arbitrary rule of uniformity that which really depends on the varying significance of facts which cannot be so measured."

The majority of the Illinois court were of opinion not only that there had been error, but that the error was sufficiently serious for a reversal. Three members of the court entertained the view that although the course of the district attorney was open to criticism, the error, if any, should be disregarded in view of the general cogency and strength of the evidence upon which the conviction was found.

Interstate Commerce—Newspaper Advertising.—In Post Printing & Publishing Co. *v.* Brewster, 246 Fed. 321 (D. C.), attention was called to Laws of Kansas, 1917 (chap. 166, sec. 1), which declares it shall be unlawful for any person, company, or corporation to barter, sell, or give away any cigarettes or cigarette papers, and to section 2 declaring that it shall be unlawful for any person, company, or corporation to advertise cigarettes or cigarette papers. It appeared that plaintiff, a Missouri corporation, engaged in the business of printing a newspaper in the State of Missouri, sold and distributed its newspaper throughout the State of Kansas, delivering the same by means of the postal service, express companies and other carriers. The sale of cigarettes was authorized in the State of Missouri, and Congress has placed no restrictions on interstate commerce in cigarettes. It was held that the statute, in so far as it was levied against the advertisement of cigarettes in a newspaper distributed in interstate commerce, was unconstitutional and its enforcement by State officials may be enjoined. The following is from the opinion:

"The sale of cigarettes in the State of Missouri, where the newspapers of plaintiff are published, is a lawful business, and the transmission by plaintiff of the intelligence where and on what terms cigarettes may be purchased by its subscribers, by way of advertisements inserted in such newspaper, is perfectly legitimate and proper. Further, it must be regarded as settled the sale of cigarettes in a